Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Glen Gower et al.,

complainants,

and

United Transportation Union,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 26218-C

Glen Gower,

applicant,

and

United Transportation Union,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 27031-C

Canada

Cindy Little,

applicant,

and

United Transportation Union,

respondent,

and

Canadian National Railway Company,

employer.

Board File: 27032-C
Neutral Citation: 2012 CIRB **622**
January 23, 2012

A panel of the Canada Industrial Relations Board (the Board), composed of Mr. Douglas G. Ruck, Q.C., Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members, considered the above-mentioned applications. Case management meetings, conference calls, and hearings were held at the Board's Ottawa office and at the Board's Toronto office on October 31, 2008, May 5, 2009, June 12, 2009, August 13 and 14, 2009, September 9, 2009, October 13, 2009, November 12 and 13, 2009, January 11 and 12, 2010, and April 7, 2010.

These reasons for decision were written by Mr. Douglas G. Ruck, Q.C., Vice-Chairperson.

Appearances

Mr. James L. Shields, counsel for Mr. Glen Gower et al., and Ms. Cindy Little;
Mr. Brian Shell and Ms. Rosie Basa, counsel for the United Transportation Union;
Ms. Johanne Cavé, counsel for the Canadian National Railway Company.

I–Nature of the Complaint and Applications

[1] On March 23, 2007, Mr. Glen Gower, on his own behalf and on behalf of Messrs. Nelson Beveridge, Edward Page, Guy Ethier, Andrew M.P. Weir, Trevor Hopwood, Tom Redgrift, Alan McDavid, Stephen Ritskes, Ken Reiss, William Johnson, Carl Wallace, James Lennie, Stephane Pommet, Robin Stroud, Paul D. Swim, Arthur James King, Gilles Marcoux, Mike Vestrocy and Ms. Cindy Little (the complainants) filed a complaint with the Board alleging that the United Transportation Union (the UTU or the respondent union) specifically, President Paul C. Thompson, International Vice Presidents John W. Armstrong and Robert W. Sharpe and Canadian Legislative Director Tim S. Secord acted in a manner contrary to sections 37 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) (Board file no. 26218-C) (the main complaint). The UTU denies that it has violated the *Code* and asks that the complaint be dismissed.

[2] On September 2, 2008, Messrs. Guy Ethier and Robert Thompson, on behalf of the complainants, filed an application pursuant to section 19.1 of the *Code* for interim relief (Interim Application One) (Board file no. 27031-C). The Board was subsequently advised that Mr. Ethier had resigned as General Chairperson and that all matters before the Board in his name were assumed by Mr. Glen Gower. The complainants asked, in part, that the Board direct UTU to allow the Acting General Chairperson, Mr. Glen Gower, access to the office of the General Chairperson in Sault Ste. Marie, Ontario.

[3] Also on September 2, 2008, Ms. Cindy Little, on behalf of the complainants, filed a second application pursuant to section 19.1 of the *Code* for interim relief (Interim Application Two) (Board file no. 27032-C). The complainants requested, in part, that the Board direct UTU to provide all accounts and financial statements with respect to the financial affairs relating to the representation of the Canadian UTU membership and to release all local financial accounts for the purpose of the local representation and the paying of previously authorized funds.

[4] The information and evidence placed before the Board in relation to these matters took place over an extended period of time and, as with the issues determined by the Board in *Canadian National Railway Company*, 2007 CIRB 379 (RD 379); and *Hackl*, 2010 CIRB 545, the matters in dispute had

their genesis in the notice of strike action issued by the UTU General Chairpersons in February 2007 and the subsequent dispute between the UTU International and the General Chairpersons representing the employees of Canadian National Railway Company (CN Rail or the employer).

[5] The UTU filed a preliminary motion to dismiss the applications and complaint. The Board dismissed the UTU's motion at the oral hearing, with reasons to follow. Following numerous case management meetings, a change in legal counsel for the complainants, teleconferences and meetings and discussions between the parties and the Board's oral ruling on the UTU's preliminary motion, the parties submitted a Joint Statement of Facts to the Board on April 1, 2010.

[6] After carefully reviewing and considering the submissions of the parties, the Board has decided to dismiss the applications for interim relief and the main complaint, for the reasons that follow.

II–Facts and Background

[7] In order to fully understand the matters in dispute, it is important to briefly review the background of the dispute between the UTU International and the General Chairpersons, before delving into the merits of the main complaint, which deals with the manner in which the UTU handled grievances during the period of internal strife and the unpaid wages by the UTU, allegedly owed for work performed by former UTU representatives. The following sets out the facts as generally agreed upon by the parties.

A–Dispute Between the UTU International and the General Chairpersons

[8] As indicated above, the issues in this case had their genesis in a Notice of Strike Action issued by the UTU General Chairpersons on February 6, 2007, which had not been approved by the UTU International, under its Constitution. UTU members in Canada began to withdraw their services on February 10, 2007. CN Rail filed an application for a declaration of unlawful strike with the Board on the basis that the notice of strike action was invalid. On February 19, 2007, the Board dismissed the application for a declaration of unlawful strike. The reasons for its decision were set out in RD 379. In that decision, the Board held that the internal dispute or disagreement respecting the

application of the Constitution and the failure or refusal of the General Chairpersons to acquire the assistance of the International President, was not a matter for the Board to consider.

[9] In January 2007, the UTU in Canada had established four General Committees, organized along geographic areas, in order to represent all employees of CN Rail covered by the UTU's certification:

(a) For Eastern Canada, the UTU had established GCA-GO-121, whose General Chairperson was Raymond Lebel.

(b) For Central Canada, the UTU had established GCA-GO-105, whose General Chairperson was Rex Beatty, with two full time Vice-Chairpersons.

(c) For Western Canada, the UTU had established GCA-GO-129, whose General Chairperson was Bryan Boechler. There was one full time Vice Chairperson and two part time Vice Chairperson.

(d) In the City of Ottawa, the UTU had established a National Office, where staff consisted of two International Vice Presidents and a Legislative Director for Canada.

[10] The named complainant, Mr. Glen Gower, was the Local Chairperson for Local 483, from December 1998 until October 31, 2007. This local formed part of the UTU General Committee 105 (GCA-GO-105), whose General Chairperson was Rex Beatty. This Committee represented employees of CN Rail for Central Canada.

[11] On February 19, 2007, the UTU International Board of Directors met to address the matter of the internal union dispute between the Canadian General Chairperson and the UTU International. The Board of Directors passed a resolution immediately suspending the General Chairpersons and three Vice Chairpersons and appointing UTU Canadian Vice-Presidents Messrs. Armstrong and Sharpe to resume negotiations with CN Rail on behalf of the UTU.

[12] On February 23, 2007, back-to-work legislation, Bill C-46, *An Act to provide for the resumption and continuation of railway operations* (*Railway Continuation Act, 2007*, S.C. 2007, c. 8), 1st Sess. (Royal Assent April 18, 2007), was tabled in the House of Commons. The next day, CN Rail and the UTU concluded a tentative Memorandum of Settlement, which was subject to ratification, along with an Interim Back to Work Protocol. The UTU membership rejected the Memorandum of Settlement. Mr. Andrew Sims, Q.C., who was appointed under the *Railway Continuation Act, 2007*, *supra*, to resolve the labour dispute, released his Final Offer Selection Award on June 24, 2007.

[13] Meanwhile, on March 1, 2007, the Teamsters Canada Rail Conference (TCRC) filed an application for certification to displace the UTU and to represent the employees of CN Rail. On December 27, 2007, the Board found that the *Railway Continuation Act, 2007*, *supra*, did not have the effect of closing the open period to apply for certification and granted consent to the TCRC's application for certification, which was filed during a lawful strike (see *Canadian National Railway Company*, 2007 CIRB 398 (RD 398)). The Board subsequently ordered a representation vote.

[14] On August 29, 2008, the TCRC was successful in the representation vote to displace the UTU. On that same day, the UTU International President wrote to the General Committee Officers, Legislative Chairpersons and Local Presidents and Secretary/Treasurers, and pursuant to the President's power under Article 16 of the UTU Constitution, declared the General Committee Offices, Legislative Boards and Local Unions defunct and directed that all property automatically vested in and/or be returned to the UTU International.

[15] Further to the UTU International President's August 29, 2008 letter, the UTU International took measures to secure the offices and assets of all Locals and General Committees of adjustment, including all bank accounts and records related to the financial situation of the Locals and all documentation relating to the grievance and arbitration cases.

[16] The TCRC was certified on September 2, 2008, to represent the employees in the bargaining unit previously represented by the UTU (see Board Order No. 9507-U).

B–Handling of Grievances

[17] Under the UTU Constitution, a General Committee is composed of Local Chairpersons from each local union under the General Committee's jurisdiction and is delegated the responsibility to administer the collective agreement applicable to the members of their respective and specific local unions. The Local Chairperson is required to attend and represent members at all employer discipline investigations, to progress grievances at step two, and to interact with local management on behalf of members. If the matter is not resolved at step two, the Local Chairperson would generally forward the grievance material to the General Committee for further progression, including CN Rail's response at step two (if any).

[18] Under the UTU Constitution, the General Chairperson is responsible for the further administration of the collective agreement, including the progression of grievances at step three and/or arbitration, for interacting with senior management at the VP and labour relations officers levels and for contract negotiations. The General Chairperson is assisted by a Vice General Chairperson.

[19] In January 2007, all Local Chairpersons were responsible for progressing grievances in the manner described above. In GCA-GO-105, the General Chairperson, Rex Beatty, or his delegated Vice Chairperson, were responsible for progressing grievances at step three or to arbitration. For GCA-GO-129, General Chairperson Bryan Boechler or either of the Vice Chairpersons, Hackl, Franko or Barr were responsible for progressing grievances to step three or arbitration.

[20] Following the resolution of the UTU International Board of Directors dated February 19, 2007, to remove the General Chairpersons and Vice Chairpersons, the responsibility for processing the grievances to step three and/or arbitration and for making determinations respecting such matters was assigned to UTU Vice- Presidents Armstrong and Sharpe. The International President appointed Mr. Secord to handle the claims and grievances, which had been accumulating in the GCA-GO-105 offices, before the expiration of time limits under the collective agreement. However, Mr. Secord was never actually deployed to assist in the handling of claims and grievances at the GCA-GO-105

offices, as Vice President Sharpe indicated he would attend to such duties. Interim measures were also put in place by the UTU International for the offices in Western Canada (GCA-GO-129).

[21] On June 19, 2007, Vice President Sharpe was given permission to appoint Mr. Guy Ethier to act in the capacity of Acting General Chairperson for GCA-GO-105, because Messrs. Sharpe and Armstrong were working on approximately 100 to 120 grievances at the same time CN Rail responded to 200 additional step three grievances.

[22] With the General Committee interim appointments, the grievances would be progressed to step three by the interim General Chairpersons under the direction of Armstrong and/or Sharpe, who wrote many of the grievances. In Central Canada, no grievances were progressed to arbitration in this period and only a few in Western Canada.

[23] During the months of February 2007 to June 2007, Messrs. Sharpe and Armstrong reached agreements with the employer to extend time limits prescribed at step three of the grievance procedure to June 19, 2007, and this was subsequently further extended to July 19, 2007. These extensions were conditional on the proviso that all of the affected grievances were timely at the time of the applicable extension. The agreement did not cure time limit issues for the period when the former General Chairpersons had responsibility, i.e. those that preceded February 2007.

[24] Between the months of February and September 2007, several grievances and arbitrations were declined by CN Rail on the grounds that the time limits under the collective agreement had not been complied with both in Western and in Central Canada (GCA-GO-105 and GCA-GO-129). The parties attached a list of grievances and arbitrations that were declined by CN Rail on the ground of timeliness.

[25] In September 2007, a process was set in place for the election of new officers for General Committees 105 and 129. On October 26, 2007, Mr. Guy Ethier was elected General Chairperson for GCA-GO-105, and Mr. Robert Thompson was elected General Chairperson for GCA-GO-129 (Western Canada). Mr. Glen Gower was elected Vice Chairperson of GCA-GO-105 and Mr. Wade Franko was elected Vice Chairperson for GCA-GO-129.

[26] The newly elected General Chairpersons, Guy Ethier or Vice Chairperson Glen Gower for GCA-GO-105 were responsible for progressing grievances to step three or to arbitration as they may determine. For GCA-GO-129, General Chairperson Robert Thompson or Vice Chairperson Wade Franko were responsible for progressing grievances to step three and to arbitration, as they may determine. Until September 2008, the elected officers were responsible for the administration of their respective General Committees, including the processing of grievances to the third level and to arbitration. However, Mr. Guy Ethier resigned as General Chairperson for GCA-GO-105 on August 29, 2008.

[27] On July 29, 2008, Arbitrator Michel G. Picher issued an ad-hoc award respecting the application of the provisions of Article 84 of the collective agreement, which governs referral of grievances to the Canadian Railway Office of Arbitration and Dispute Resolution.

[28] To the knowledge of the parties, no individual grievor who may be affected by a lapse of a time limit specified in a former UTU collective agreement during the material time has filed a duty of fair representation complaint naming the UTU or any of its subordinate bodies or any of its former officers of any of its subordinate bodies as respondents.

C–Unpaid Wages

[29] As a result of the steps taken by the UTU International to secure the assets of the UTU and its subordinate bodies from August 2008 onward, eleven former UTU representatives of GCA-GO-105 and GCA-GO-129 have not been paid wages and expenses which they claim they are owed for work they performed for a subordinate body of the UTU in representing members of a UTU subordinate body.

[30] As per the UTU Constitution, subordinate bodies receive revenue through the allocation of union dues and each subordinate body is responsible for maintaining funds for the purposes of paying the expenses of the subordinate body. Article 12 of the UTU Constitution sets out how dues and assessments paid to the UTU International are to be handled.

[31] The UTU International denied these unpaid wages claims on the basis that (i) there were no funds in the subordinate body account against which the wages/expenses were claimed; or (ii) the UTU determined that the claims were not properly supported by receipts, documentation or confirmation of authorization for work allegedly performed, or confirmation that the work was in fact performed.

[32] The complainants compiled documents in support of their expense claims which are being advanced in the present complaint.

[33] Before turning to the merits of the duty of fair representation complaint, the Board will set out the parties' positions and its decisions on the preliminary motion and the interim applications. The parties were advised orally of the Board's ruling with respect to the preliminary motion to dismiss and were told that full reasons would be provided when the Board issues its final decision.

III–Preliminary Motion to Dismiss

A–Positions of the Parties

[34] In addition to their written submissions, the parties presented oral arguments to the Board concerning the union's preliminary motion to dismiss all matters before the Board. Below is a brief summary of the parties' positions.

1–The UTU

[35] The UTU submitted that all matters before the Board should be dismissed on the basis that they fail to disclose a *prima facie* case. It submitted that the complaint is concerned with internal union affairs, which is beyond the scope of section 37 of the *Code*. The union also submitted that the present matters have been rendered moot by the passage of time. Since the main complaint was filed, the work stoppage has ended and the TCRC displaced the UTU as the bargaining agent. The UTU submitted that, as a consequence of the change in certification, it is inappropriate for the Board to order the UTU to address grievances that are no longer under its control.

[36] The UTU also took the position that there exists no labour relations purpose in proceeding with the section 37 complaint. It stated that neither Gower nor Little had the requisite standing to bring these matters before the Board as none of the former members of UTU affected by the grievances in question have filed a complaint with the Board alleging wrongdoing on the part of the union.

2–The Complainants

[37] The complainants took the position that this was a preliminary motion and that the Board had yet to hear any evidence respecting the veracity of the complaint and applications. The facts, in the complainants' view, needed to be tested before declaring that there was no substance to the complaint.

[38] The complainants submitted that the change in certification was not relevant to the outcome of the complaint. It argued that the UTU's departure did not excuse it from the consequences of its previous actions.

[39] The complainants submitted that the nature of the complaint is not concerned with the internal actions of the union, but is seeking to have the Board examine matters which fall under the authority of the *Code*.

B–Board's Ruling on Preliminary Motion to Dismiss

[40] Following the presentation of the parties' oral submissions on the preliminary motion, the Board, after review and deliberation, delivered its ruling from the bench denying the union's preliminary motion to dismiss the complaint and applications.

[41] While there were aspects of the complaint and applications which had been impacted by the passage of time and, in particular, the change in the bargaining agent, the Board found that it would be premature to dismiss the matters without a proper consideration of all the relevant evidence and the legal arguments.

[42] Based upon the information before the Board at the time the preliminary motion was argued, it was not satisfied that the complaint was one concerned exclusively with the internal workings of the union or that it required the Board to examine UTU's constitutional authority with respect to its actions. Before such a determination was to be made, the Board required an opportunity to consider the matter in its entirety.

IV–Positions of the Parties on the Applications for Interim Relief (Board files 27031-C and 27032-C) and the Section 37 Complaint (26218-C)

A–The Complainants

1–Applications for Interim Relief

[43] The complainants submit that, after the Board ordered a representation vote in the context of the displacement application filed by the TCRC, the UTU International served notice on the Locals in August 2008 that effectively froze all the Locals' financial accounts. This notice advised that:

> This will serve as notification that effective 12:01 a.m. August 9, 2008, **no** transactions in connection with these account(s) are authorized without the express written permission of the undersigned. We further advise that UTU intends to take steps, in accordance with our legal rights, to ensure that the assets in account(s) at your Branch remain under the control of and available to the UTU.
>
> M.B. Futhey Jr.
> International President
>
> Kim N. Thompson
> General Secretary - Treasurer
>
> (emphasis in original)

[44] Following the representation vote, in which TCRC was determined to be the successful union, the complainants submit that the UTU also seized assets from the Locals, which were deemed to be assets of the UTU. By letter dated August 29, 2008, Mr. M.B. Futhey, the International President, advised that:

> ... all property, funds and securities, of any kind whatsoever of the now defunct Ontario Legislative Board shall automatically vest in the UTU International Union. I hereby further direct that all officers of the Ontario Legislative Board forthwith deliver to UTU General Secretary & Treasurer Thompson, within 5 days of receipt of this letter, all supplies and equipment ...

[45] The complainants submit that the UTU International seized the Office of the General Chairperson in Sault Ste. Marie and changed the locks. They submitted that there was a scheduled arbitration hearing for the week of September 8, 2008 involving pension credits, however the files critical to the arbitration were withheld as a result of the UTU International's actions. It was the complainants' position that the union's actions had an immediate and negative irreparable impact on the Canadian UTU membership, as they were effectively denied the representation they were statutorily owed by the UTU.

[46] In Interim Application One, the complainants requested that the Board issue a number of interim orders, including orders directing the UTU International to:

(a) allow access to the Office of the General Chairperson in Sault Ste. Marie to the Acting General Chairperson (Mr. Glen Gower) or his delegate(s).

(b) not remove, alter, destroy or otherwise tamper, etc., with any files, documents, grievances, etc., required for the representation of the Canadian Members of the UTU or as will be required in the representation of the TCRC upon recognition of such organization of the bargaining agent for such members. And, upon such certification, insure such materials are properly and immediately delivered to the TCRC.

(c) cease and desist in any actions, directly or indirectly, including but not limited to denying access of the General Chairperson's Office in Sault Ste. Marie for purposes of preparing and concluding the arbitration set for the week of September 8, 2008, with respect to representation of the Canadian UTU membership and that of the TCRC upon being recognized as the bargaining agent for such members.

[47] In Interim Application Two, the complainants point out that, in the absence of having access to funds, they were unable to be represented with respect to grievances, disciplinary matters and pursuing short and long term disability claims as well as human rights matters. Additionally, the complainants contend that they have not been compensated for expenses or lost wages incurred when representing members in the name of the UTU.

[48] The complainants say that the dissolving of the Ontario Legislative Board and the Offices of the General Chairpersons compromises ongoing matters as well as future cases. According to the complainants, the union has interpreted and applied the union's constitution in an unprecedented manner that is arbitrary, discriminatory and in bad faith.

[49] The complainants requested that the Board issue a number of interim orders, including orders directing the UTU International to:

(a) release all local financial accounts (and funds therein) for the purpose of local representation and the paying of previously authorized funds and until such time as the Board determines correct ownership and entitlement.

(b) reinstate the Ontario Legislative Board and the Offices of the General Chairperson(s) - (and other Offices as similarly affected) and release all financial accounts (and funds therein) for the purpose of such representation and the paying of previously authorized funds.

(c) release all Canadian "UTU" Department financial accounts (and funds therein) until such time as the Board determines correct ownership and entitlement.

(d) cease and desist from any actions with respect to the acquiring of any "local assets" and all other assets of the Canadian UTU (including files) until the Board determines ownership of such assets (including files).

(e) provide all the records, accounts, financial statements, etc., with respect to its financial affairs with respect to Canadian dues and monies relating to the direct representation of the Canadian UTU membership (all Departments).

2–Section 37 Complaint

[50] The complainants conceded that the remedies as originally sought may, to some degree, be considered as moot at this point in time but that regardless of the passage of time, the union was still responsible for the impact that the expulsion of the General Chairpersons and Vice Chairpersons had upon the existing grievances and the resulting financial losses. The complainants submit that the UTU's actions were arbitrary and in bad faith.

[51] The complainants submit that, when the UTU International Board of Directors appointed Messrs. Armstrong and Sharpe to run the affairs of the four General Committees, it became their responsibility to proceed with any and all existing grievances. As indicated by the President's letter of May 25, 2007, they submit that the union was aware that the grievances were accumulating and no one was handling them. The complainants point out that Mr. Secord, who was specifically appointed to handle the grievances, was never actually deployed, as Mr. Sharpe indicated that he would attend to these matters. The complainants submit that neither Sharpe nor Armstrong could handle the increased responsibilities and that, other than attempting to get an extension on the grievances, very little if anything was to done to process the outstanding grievances.

[52] The complainants submit that they are not asking the Board to make a finding that the union's internal strife was contrary to the *Code*, but rather that the actions of the International President of February 19, 2007 in removing the General Chairpersons and full time Vice Chairpersons from office was retaliatory, as was the failure to handle the grievances. Additionally, such actions were negligent and constituted bad faith. The member's rights could not be adequately protected and Sharpe and Armstrong were well aware of the backlog. Even so, there was nothing going through to arbitration, and the appointment of one person in Central Canada and another in the West was merely a token effort that accomplished nothing.

[53] The complainants submit that the case law, in particular the Federal Court of Appeal's decision in *VIA Rail Canada Inc.* v. *Cairns*, 2001 FCA 133; [2001] 4 F.C. 139, clearly supports the position that those acting on behalf of the members must not act in violation of the *Code*, during collective bargaining and negotiation. The union had a statutory obligation, after expelling the Vice Chairpersons, to appoint sufficient and competent officers to conduct negotiations but failed to do so. The complainants submit that the internal problems that the union was experiencing did not relieve it of its duties under the *Code*. As stated in *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75; and [1975] 2 CanLRBR 196, a decision of the British Columbia Labour Relations Board, the complainants submit that the union's acts of revenge constitute bad faith. In the complainants' view, bad faith was compounded by the fact that competent people were available and the UTU chose to ignore them. They argue that the UTU International's resolution on February 17, 2007 was a knee jerk reaction that demonstrated serious negligence and a total disregard of the membership. The complainants submit that the UTU was an experienced and well-organized union that had the ability and competency to represent its members in the proper manner, but chose not to do so.

[54] By way of remedy, the complainants seek a declaration from the Board that the UTU breached its duty of fair representation and ask that the Board award damages to the complainants for the breach of the duty of fair representation. The complainants claim that the damages could be assessed based upon the unpaid wages and the complainants would pro-rate the amount among the members who have not been paid.

B–The UTU

[55] The UTU asks that the complainants' applications for interim relief and complaint be dismissed as:

(a) the complainants have failed to establish a *prima facie* case for the section 37 relief;

(b) the relief sought by the complainants, in view of Board Order No. 9507-U certifying the TCRC as the bargaining agent, is now moot;

(c) there is no labour relations purpose in advancing the complaint;

(d) due to the delay in advancing the complaint by the complainants, the union has suffered prejudice in preparing its response to the complaint.

[56] The UTU argues that neither Mr. Gower nor Mr. Little possess the authority or requisite standing to file the applications. According to the union, there is no evidence before the Board that any of the former members of the UTU filed a complaint against the union alleging wrongdoing and, consequently, it is not open to the former union representative to bring the applications/complaint on their own behalf as they are not section 37 complainants.

1–Applications for Interim Relief

[57] The UTU submits that the complainants' applications are without foundation as there is no urgency, emergency or existing circumstances warranting an order pursuant to section 19.1 of the *Code*.

[58] The UTU submits that the test for determining whether an interim order should be granted is contextual, and the power to grant interim orders "should be applied in a manner that reflects the intention and objectives of the statute" (see *Trentway-Wagar Inc.*, 2000 CIRB 57, paragraph 21). It is the union's contention that the objectives of Part I of the *Code* are to be found by reviewing the preamble of the *Code*, which deals principally with the benefits of managing and organizing relations between employers and certified bargaining agents and with the institutional and social benefits of collective bargaining. The preamble, asserts the union, does not deal with the management of the internal activities of trade unions, with the content of their constitutions or how they handle offending or dissident members. The present application has little if anything to do with "good industrial relations" and there is no evidence that granting the requested order would advance good industrial relations.

[59] The UTU further submits that, in order for the Board to appreciate the contextual nature of the application, it is necessary to acquire a real understanding of all the relevant facts and circumstances

and that, in matters that are complicated and interwoven with other files and matters, affidavit evidence may not be the most suitable or appropriate means of determining context. The union points out the Board should be exceedingly cautious as to how it proceeds in the present matter, as the affidavits filed in support of the complainants' case contain factual inaccuracies.

2–Section 37 Complaint

[60] The UTU submits that there are two critical hallmarks of duty of fair representation cases. The first is that the employees in the bargaining unit have certain rights, but such rights are not all encompassing. Secondly, the union must conduct itself in accordance with its duty of fair representation and the employees' rights are constrained by the union's right to make certain decisions. However, it submits that this complaint is not about the employees in the bargaining unit. Not a single employee in the bargaining unit has been done a wrong, as contemplated by the *Code*, by the union's actions. There is no indication that any of the employees were prejudiced as a consequence of the time limits. No individual employees/grievors filed a duty of fair representation complaint concerning the time limits and, as such, the complainants are asking that the Board address a hypothetical wrong.

[61] The UTU submits that many of the grievances in question arose when Sharpe and Armstrong were not administering the collective agreement. Although it is now alleged that the grievances are out of time, there is no indication as to what the TCRC has done since taking over to show that the grievances were out of time.

[62] The UTU stresses that, if the complainants are dissatisfied with the manner in which the union was wound up, the seminal document is the Constitution. The action is based in contract and recourse is through the courts. As for any dissatisfaction with the conduct of Sharpe and Armstrong, the proper recourse would be an action in tort for violation of the contract and not a complaint with the Board.

[63] The UTU does not deny that its officers took steps to protect the union's assets pending the outcome of the representation election, but submits that such did not, in any manner, prevent the

effective bargaining agent representation or the fulfilment of duties in the representation of the membership as required by the Constitution and the *Code*. The union further submits that the decisions were made in good faith and concerned the union's internal affairs. It submits that there is no indication that certain individuals have been singled out for non-payment. Rather, the union has simply taken the position that there are not sufficient funds to make payments and/or the claims were not made out properly. If, in fact, the complainants disagree with the decisions, they are entitled to appeal them in accordance with the terms and provisions of the Constitution. The union points out that none of the complainants have filed such an appeal.

[64] In addition, the UTU contends that the Board is not the appropriate forum for the complainants' claim for compensation. According to the union, the amounts claimed have nothing to do with collective bargaining rights but rather stem from an internal matter that should be heard by a Superior Court. The duty of fair representation is not a mechanism by which individuals may recover an alleged debt.

[65] It is the UTU's position that there is no factual foundation to decide upon an amount that is allegedly owed to the complainants, and the evidence is not sufficient to provide the Board with any guidance. The union says that the request for damages does not make labour relations sense and the complaint should be dismissed.

V–Analysis and Decision

A–Applications for Interim Relief

[66] Section 19.1 of the *Code* provides:

> 19.1 The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[67] Generally, the common law courts assess an application for interlocutory injunction or relief by applying a three-step criterion or test. The first step determines whether there exists a serious issue; the second step looks at whether there is the likelihood of irreparable harm and the third step

assesses the balance of convenience. As recently stated in *Hackl*, *supra*, the Board does not necessarily rely upon such factors, but rather applies section 19.1 in a manner that reflects the intention and objectives of the statute.

[68] In *Trentway-Wagar Inc.*, *supra*, the Board was reluctant to articulate a specific test for considering interim orders, but noted that as a first principle, its inquiry will consider what interim order might best fulfil the objectives of the *Code*:

> [29] In assessing what is appropriate for fulfilling the statutory objectives the present Board may utilize many analytical approaches and the three-stage test of the courts may, when appropriate, serve as a useful analytical guide. That such a test was used in the *Air Canada* case is not, then, at all surprising. Similarly, the OLRB test may, on occasion, provide guidance. However, the Board must be very careful when it chooses to utilize such an analytical framework, that this approach does not in any way obscure its consideration of the primary question of whether the interim order or measure that is being sought is appropriate to achieve the objectives of the *Code*.
>
> [30] In a manner similar to the situation of the OLRB in *William Neilson Ltd.*, *supra*, and its predecessor cases, this Board finds itself in a position where its jurisprudence concerning the application of its statutory interim relief powers is in its infancy. However, unlike the OLRB, the CIRB is reluctant to articulate an approach that it would be inclined to follow in all cases, other than to note, that as a first principle its inquiry will consider what interim order might best fulfil the objectives of the *Code*.
>
> [31] The threshold criteria of an arguable or a serious issue may be relevant depending upon the facts. The issue of the level of harm that may occur to one or the other of the parties may also be considered. The balance of convenience or relative harm between the parties often may be a factor of great importance. However, all these factors must be viewed and assessed carefully in the context of the Board's view of what is necessary in the interests of the fulfilment of the *Code*'s objectives.

[69] In *Transport Besner Inc.*, 2003 CIRB 231, the Board dismissed an application for interim relief filed by the union seeking a declaration of single employer. Relying on *Trentway-Wagar Inc.*, *supra*, the Board explained that interim orders aim to ensure compliance with the objectives of the *Code* on an interim basis. It reiterated that, although the common law criteria associated with interlocutory injunctions (serious issue, irreparable harm and balance of convenience) could serve as a useful analytical guide, the vested authority under section 19.1 of the *Code* should be interpreted in a manner that reflects the spirit and objectives of the *Code*:

> [52] The statutory criterion enacted by section 19.1 of the *Code* is both pragmatic and protective. This provision effectively sets out that, in a matter before it, the Board may issue an order it deems appropriate in order to ensure the fulfilment of the objectives of Part I of the *Code*. Thereupon, the Board will be concerned about situations in which these objectives may be impaired in the absence of an immediate order. It is therefore important to emphasize that the application of section 19.1 of the *Code* is assessed pursuant to the circumstances of each case and its particular context.

[70] As a result, each case must be assessed on its own merit, having regard to what is necessary to ensure the fulfilment of the objectives of the *Code*.

[71] Based upon the review of the evidence and submissions in support of the interim relief applications at the time they were filed, the Board is not convinced that issuing the interim orders requested would further sound labour relations between the UTU and the former General Chairpersons, particularly in the absence of having yet heard and considered the full and complete case.

[72] While the Board does not look into the merits of the complaint when seized with an application for interim relief, careful attention must be given to the objectives of the *Code*, including the statutory provision alleged to have been breached. In this instance, the complainants allege that the UTU breached section 37 of the *Code*. The purpose of section 37 of the *Code* is to protect members of the bargaining unit against possible abuses by the bargaining agent based on discrimination, bad faith or arbitrary decisions when interpreting the members' rights under the collective agreement (see *Powell*, 2000 CIRB 97). The purpose of Part I of the *Code* is to encourage free collective bargaining and the constructive settlement of disputes between workers, trade unions, and employers.

[73] In the Board's view, the remedies sought in the applications for interim relief directly touch upon internal union affairs, over which the Board has limited jurisdiction. In particular, the complainants requested that the UTU allow access to the Office of the General Chairperson in Sault Ste. Marie to the complainants; release financial accounts; reinstate the Ontario Legislative Board and the Offices of the General Chairpersons; cease and desist from any actions with respect to the acquiring of any assets (including files); provide all the records, accounts, financial statements, etc. Accordingly, the Board was not convinced that granting the interim relief requested would further the objectives of the *Code*.

[74] As was the case in *Hackl*, *supra*, this was a highly charged case, which followed a lengthy labour dispute between the UTU membership and CN Rail, and resulted in the displacement of the UTU by the TCRC. Therefore, if there was to be any form of redress, the Board was of the view that

such redress should only take place after each party has had a full opportunity to provide the appropriate evidence and arguments in support of their respective positions. To do otherwise would be contrary to the rules of natural justice and the objectives of the *Code*.

[75] Consequently, for the reasons as stated above, both applications for interim relief are dismissed.

B–Section 37 Complaint

[76] Many of the issues raised in the main complaint have been resolved by the passage of time. The main issues remaining between the parties were the outstanding grievances which had allegedly not been dealt with by the UTU and the alleged moneys owed by the UTU to the former representatives.

[77] The union's duty of fair representation towards an employee in the bargaining unit is set out in section 37 of the *Code*, as follows:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[78] The Board's role with respect to section 37 of the *Code* has been set out in numerous past decisions. Section 37 does not allow the Board to take the place of a union in assessing the merits of a grievance or to determine whether the union arrived at a correct decision. Rather, the role of the Board is to examine the union's conduct to ensure that the union properly considered the matter and did not act in a discriminatory, arbitrary or bad faith manner in reaching its decision.

[79] A union's conduct must be assessed on the basis of five principles set out by the Supreme Court of Canada in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509, which can be summarized as follows:

1. The union, because of its status as the exclusive bargaining agent for a bargaining unit, must treat all members of the unit fairly.

2. An employee does not have an absolute right to arbitration; the union enjoys considerable discretion in this regard.

3. After conducting a thorough investigation and considering the impact of the grievance on the employee versus its legitimate interests, the union must exercise its discretion in good faith.

4. The decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The union's representation must be genuine, undertaken with integrity and competence, and without serious negligence or hostility towards the employee.

[80] A complainant bears the onus, in a section 37 complaint, to present sufficient facts to establish that, on a balance of probabilities, it is more likely than not that the union contravened its obligation under section 37 of the *Code* (see *Connolly et al.* (1998), 107 di 120; and 45 CLRBR (2d) 161 (CLRB no. 1235)). A complaint cannot merely be the articulation of a perceived injustice; it must set out facts that prove the case to the Board. A complaint must do more than simply allege that a union has acted in an arbitrary or discriminatory manner or in bad faith and must provide evidence to substantiate allegations.

[81] The Board notes that the complaint is essentially by former union representatives; not by individual members of the bargaining unit who were directly affected by the grievances. In *McRae Jackson*, 2004 CIRB 290, the Board noted that the duty of fair representation is generally owed only to members in the bargaining unit:

> [24] Generally speaking, the duty of fair representation is owed only to members of the bargaining unit, although it may extend in certain circumstances [*sic*] to former bargaining unit members (see *Serge Bouchard et al.*, [2003] CIRB no. 259; and *Tremblay* v. *Syndicat des employées et employés professionnels-les et de bureau, section locale 57*, [2002] 2 S.C.R. 627). If an employee is not included in the bargaining unit, the union cannot be faulted for not taking the necessary steps to include the employee in the bargaining unit (see *Esper Powell*, [2000] CIRB no. 97).

[82] As such, the complainants' status to bring a complaint under section 37 of the *Code* is questionable. Mr. Gower filed the main complainant in his capacity as "Local Chairperson." While part of the complaint alleged that the UTU failed to preserve the time limits in the grievances during the period between February 2007 and September 2008, there was no evidence that any members of the union filed a duty of fair representation against the UTU for its alleged failure to preserve the time limits of the grievances under the collective agreement.

[83] The purpose of section 37 is not to govern disputes between executives or representatives of the union and the Board of Directors of the same union. This Board and its predecessor have consistently held that the scope of the duty under section 37 of the *Code* does not extend to internal union affairs: *Wilson et al.* (1986), 66 di 201 (CLRB no. 583), at page 210. In other words, section 37 of the *Code* is not to be used as a vehicle for litigating purely internal union disputes over such matters as the administration or application of its constitution or by-laws, including the election and appointment of officers and the internal administration of the union.

[84] The complainants were dissatisfied by the effect that the appointment of Messrs. Armstrong and Sharpe to run the affairs of the four General Committees had on negotiating the tentative Memorandum of Settlement, which was ultimately rejected by the membership, and the handling of the grievances. The complainants asked the Board to make a finding that the actions of the International President of February 19, 2007 in removing the General Chairpersons and full time Vice Chairpersons from office was retaliatory, as was the failure to handle the grievances. The complainants also allege that they should be compensated for unpaid wages for work done in their capacity as union representatives.

[85] The UTU argued that, if the complainants are dissatisfied with the manner in which the union was wound up, the seminal document is the Constitution. Consequently, the UTU submitted that the available and appropriate forum for the complainants' discontent is in superior courts.

[86] In the Board's view, the complainants are asking the Board to make a finding related to internal union affairs. The Board finds that the actions of the International President of February 19, 2007 in removing the General Chairpersons and full time Vice Chairpersons from office are solely a

matter of internal union affairs and does not concern rights under the collective agreement. The Board's jurisdiction under the *Code* to determine complaints alleging that a union has breached its duty of fair representation owed to its members does not extend, in these circumstances, to an examination of the removal of the General Chairpersons and full time Vice Chairpersons from office.

[87] In the Board's view, the line of authorities which expanded the scope of the duty of fair representation to collective bargaining is of little use in the present case. In *VIA Rail Canada* v. *Cairns*, *supra*; *Soulière*, 2002 CIRB 205; and *Reynolds*, (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607), the Board was dealing with duty of fair representation complaints in which it was alleged that the union breached its duty in the manner in which it negotiated rights under the collective agreement. The Board found, and the Federal Court of Appeal confirmed, that the duty of fair representation extends to the negotiation of collective agreements. However, the present case does not deal with the UTU's conduct in negotiating rights under the collective agreement. It deals with the union's decision to adopt an internal resolution, which had the effect of replacing the bargaining committee and the Chairpersons responsible for processing grievances to the third step of the grievance process. This decision was made on the same day the Board dismissed the unlawful strike application filed by CN Rail, although the UTU International had not approved the strike action. This complaint also deals with the manner in which the UTU wound up its affairs following the results of the representation vote in the displacement application filed by the TCRC. While the Board understands that the complainants felt these actions were retaliatory, the Board does not have the mandate to scrutinize actions taken by the union under their Constitution in the context of a duty of fair representation complaint.

[88] That said, the evidence before the Board reveals that the UTU did take steps to preserve the time limits of the grievances. While Mr. Secord was never actually deployed to assist in the handling of claims and grievances at the GCA-GO-105 offices, Vice President Sharpe was given permission to appoint Mr. Guy Ethier to act in the capacity of Acting General Chairperson for GCA-GO-105, because Messrs. Sharpe and Armstrong were working on approximately 100 to 120 grievances at the same time CN Rail responded to 200 additional step three grievances. During the months of February 2007 to June 2007, Messrs. Sharpe and Armstrong reached agreements with the employer to extend time limits prescribed at step three of the grievance procedure to July 19, 2007. These

extensions were conditional on the proviso that all of the affected grievances were timely at the time of the applicable extension. The agreement did not cure time limit issues for the period when the former General Chairpersons had responsibility, i.e. those that preceded February 2007. While very few grievances were progressed to arbitration in this period, the complainants have not provided sufficient evidence that individual grievors were affected by the timeliness of the grievances during the time the new UTU General Chairpersons were responsible for those grievances. In the Board's view, the complainants have not provided sufficient evidence to suggest that the UTU acted in an arbitrary, discriminatory or bad faith manner in its handling of the grievances following the UTU's resolution in February 2007.

[89] With respect to the amounts that are allegedly owed to the complainants, the Board notes that these amounts were allegedly owed under the Constitution, not the collective agreement. These are matters which should have been dealt directly with the UTU, under the Constitution. The Board does not have the mandate to determine how former UTU representatives are to be compensated or to enforce the provisions of the union's Constitution.

[90] The UTU submitted that there is no labour relations purpose protected by section 37 or by the *Code* generally that will be advanced should this complaint be granted, particularly because the UTU has since been displaced by the TCRC. The complainants requested that the Board declare that the UTU acted contrary to section 37 of the *Code*.

[91] Given the findings and conclusions set out herein and the fact that there is no collective agreement right that is being advanced by this complaint, there would be no labour relations purpose served by a finding that the UTU had been in violation of the section 37. The UTU is no longer the bargaining agent for the employees in the unit. The Board fails to see how the complaint could possibly result in the promotion of harmonious industrial relations of the *Code*.

VI–Conclusion

[92] For the reasons stated above, the Board dismisses the two applications for interim relief and the main complaint under section 37 of the *Code*.

[93] This is a unanimous decision of the Board.

Douglas G. Ruck, Q.C.
Vice-Chairperson

Patrick J. Heinke
Member

Daniel Charbonneau
Member